NORDIN SALLEH & ANOR.

v.

DEWAN UNDANGAN NEGERI KELANTAN & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
EUSOFF CHIN J
[SUIT NO.R1-22-11-91]
8 NOVEMBER 1991

CONSTITUTIONAL LAW: *Fundamental liberties - Resolution passed by State Legislature prohibiting elected members from continuing to be a member if they resigned from the party on whose ticket they were elected - Whether said article contravened the Federal Constitution - Reasonableness - Object and purpose of resolution - Test to be applied - Direct and inevitable consequence of resolution - Effect on right of citizen - Right guaranteed by constitution - Kelantan State Legislature, Article XXXIA - Federal Constitution, Articles 4(1), 10(1)(c), (2)(c)*

The plaintiffs were elected members of the Dewan Undangan Negeri (DUN) Kelantan, the first defendant. On 3 July 1991 the first defendant passed a resolution pursuant to the Enakmen Undang-undang Perlembagaan Tubuh Kerajaan Kelantan (Bahagian Pertama)(Pindaan) 1991 that the plaintiffs had ceased to be members of the DUN Kelantan and declared their seats vacant.

The main prayer of the plaintiffs was for an order declaring that Article XXXIA of the Kelantan State constitution was invalid, null and void as it was *ultra vires* the provisions of Article 19(1)(c) of the Federal Constitution.

Article XXXIA prohibited a member of the DUN if he resigned from a political party from continuing to be a member of the DUN and may be declared vacant by the said DUN.

Learned Counsel for the defendants submitted that Article XXXIA does not prevent a member of the State Legislative Assembly who is a member of a political party and because the said article was not inconsistent with Article 10(1)(c) of the Federal constitution. It was further contended that the 2 plaintiffs were elected members and therefore their right to continue to be members of the State Legislative Assembly was not a fundamental right but a statutory right and this statutory right can be removed by the law made by the State Legislative Assembly relating to disqualifications of membership of that Legislative Assembly.

The plaintiffs on the other hand were not contending that the State Legislative Assembly of Kelantan had no power to make that law (Article XXXIA) but that the said article was inconsistent with the provisions of the Federal Constitution as it restricted the plaintiffs from exercising their right of association which was a fundamental right guaranteed by Article 10 (1)(c) of the Federal Constitution.

Held:

[1] While Article 19(4) of the Indian Constitution allows reasonable restrictions to be imposed on the right of a citizen to exercise his right of association, Article 10(2)(c) of our Federal Constitution does not specify the imposition of reasonable restrictions. It authorises Parliament to impose by law "such restrictions as it deems necessary or expedient in the interest of the security of the federation or any part thereof, public order or morality". Reasonableness is not material in Article 10(2)(c) of the Federal Constitution.

[2] The main object and purpose of Article XXXIA is to prevent a member of the assembly who is or since the date of his election has become a member of a political party, from leaving that political party for whatever reasons. It also has the object of ensuring that a party member should be loyal to his party and follow the directions of his party in carrying out his functions in the Assembly or else the party may expel him from the party, resulting in his losing his seat in the assembly.

[3] The test to be applied in determining whether a statute infringes a particular fundamental right was settled in *Smt. Maneka Gandhi v. Union of India* where it was held that the correct test to be applied was as to what was the direct and inevitable consequence or effect of the impugned statute on the fundamental rights of the plaintiffs. Where therefore the statute directly affects the fundamental right or its inevitable effect on the fundamental right is such that it makes the exercise of the right ineffective or illusory, the statute must be held to be unconstitutional and must be struck down.

[4] Applying the said test it is crystal clear that Article XXXIA of the Kelantan State Constitution imposes a restriction on the exercise by the plaintiffs here of their right of association guaranteed by Article 10(1)(c) of the Federal Constitution.

To that extent it is unconstitutional under Article 4(1) of the Federal Constitution as it infringes and is inconsistent with Article 10(1)(c) of the Constitution.

[5] Only Parliament may enact law to impose any restriction on the exercise of the fundamental right of a citizen to associate which was guaranteed under Article 10(1)(c) of the Federal Constitution.

Cases referred to:
Minister of Home Affairs & Anor v. Fisher & Anor. [1979] 3 All ER 21 ***(cons)***
Dato Menteri Othman bin Baginda v. Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29 ***(cons)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(cons)***
Mian Bashir Ahmad & Ors. v. State of Jammu & Kashmir & Ors. [1982] AIR 26 ***(foll)***
Smt. Maneka Gandhi v. Union of India, AIR 78 SC 597
Abdul Karim bin Abdul Ghani v. Legislative Assembly of Sabah [1988] 1 CLJ (Rep) 1 ***(dist)***

Legislation referred to:
Constitution of the State of Sabah, art. 18
Federal Constitution, arts. 4(1)(c), 10(2)(c), 19(1)(c)
Constitution of India, arts. 2, 19(4)
J & K Representation of the People Act [Ind], s. 24 G (a)
Constitution of the State of Kelantan, art. XXXIA

For the plaintiff - Zaki Tun Azmi; M/s. Rashid & Lee
For the defendant - Zainur Zakaria; Zulkifli Nordin; M/s. Zainur Zakaria & Co.

JUDGMENT

Eusoff Chin J:

The facts of the case had been agreed to by the parties, and they are:

a) The plaintiffs were elected to the Dewan Undangan Negeri Kelantan during the General Elections held on 21 October 1990 and subsequently sworn in as members.

b) On 25 April 1991 the first defendant passed the Enakmen Undang-undang Perlembagaan Tubuh Kerajaan Kelantan (Bahagian Pertama) (Pindaan) 1991.

c) On 3 July 1991 the first defendant passed a resolution pursuant to the impugned legislation that the first and second plaintiffs had ceased to be members of the Dewan Undangan Negeri Kelantan and declared the seats for the constituencies of Sungai Pinang and Limbongan vacant.

d) By reason of the vacancies the Election Commissions of Malaysia took steps to hold by-elections in the aforesaid constituencies, with the dates of nominations of candidates fixed for 12 August 1991 and the by-elections held and completed on 26 August 1991.

e) In the by-elections aforesaid, the plaintiffs stood for election as candidates of the Barisan Nasional but lost.

The enactment mentioned in para. (b) of the agreed facts amended Part One of the constitution of the State of Kelantan (hereinafter referred to as the Kelantan State Constitution) by introducing a new Article XXXIA which states as follows:

Vacation of seat due to resignation, etc., from political party.

> XXXIA.(1) If any member of the Legislative Assembly who is a member of a political party resigns or is expelled from, or for any reasons whatsoever ceases to be a member of such political party, he shall cease to be a member of the Legislative and his seat shall become vacant.
>
> (2) For the purpose of Clause (1) the Legislative Assembly shall determine whether eat becomes vacant and the determination of the assembly shall be final and shall not be questioned in any Court on any ground whatsoever.

Although the State Legislative Assembly, Kelantan passed the enactment on 25 April 1991, Article XXXIA was made to have restrospective effect to 19 November 1990.

The plaintiffs have sought a number of orders, but both parties agreed that the main prayer should be first heard and determined by the Court since the other prayers are for consequential orders. The main prayer is for an order declaring that Article XXXIA of the Kelantan State Constitution is invalid, null and void as it is *ultra vires* the provisions of Article 19(1)(c) of the Federal Constitution.

Encik Zaki Tun Azmi, the learned Counsel for the two plaintiffs submitted that the plaintiffs are not contending that the State Legislative Assembly of Kelantan had no power to make that law (Article XXXIA) but that Article XXXIA is inconsistent with the provisions of Article 10(1)(c) of the Federal Constitution, and because of that, Article XXXIA of the Kelantan State Constitution is void under Article 4(1) of the Federal Constitution.

Article 4(1) of the Federal Constitution states:

Supreme law of Federation.

> 4.(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this constitution shall, to the extent of the inconsistency, be void.

Encik Zainur Zakaria, the learned Counsel for the defendants and Encik Zaki informed me that they would be citing as authorities the decisions of the Courts in India since Article 10 of the Federal Constitution and Article 19 of the Constitution of India contained provisions relating to rights of citizens to form associations. For ease of reference I quote both the relevant provisions here:

	Federal Constitution of Malaysia		Constitution of India
Article 10(1) Subject to	Clauses (2), (3) and (4):		19(1) All citizens shall have the right:
Freedom of speech, assembly and association	(a) every citizen has the right to freedom of speech and expression	Protection of certain rights regarding of speech, etc.	(a) to Freedom of speech and expression;
	(b) all citizens have the right to assemble peaceably and without arms;		(b) to assemble peacebly and without arms;
	(c) all the citizens have the right to form associations		(c) to form associations or unions.
	(2) **Parliament** may by law impose -	(2)	xxx xxx xxx xxx
	(a) xxx xxx xxx	(3)	xxx xxx xxx xxx
	(b) xxx xxx xxx	(4)	Nothing in subclause
	(c) on the right conferred by paragraph (c) of clauses (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part order or morality.	(c)	of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent **the State** from making any law imposing, in the interest of the sovereignty and inter-grity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.
	(3) Restrictions on the right to form asso-ciations conferred by para. (c) of Clauses. (1) may also be imposed by any law relating to labour or education.		(Emphasis added)

It is to be noted that whereas the Federal Constitution authorises only Parliament to make law to impose restrictions on the right to form associations, the Indian Constitution authorises a State to do so. The word State under Article 2 of the Indian Constitution means an individual State or State Legislative Assembly. Both the said Article 10(2)(c) and Article 19(4) specify two common grounds on which restrictions may be imposed on the right to form association, that is "in the interest of ... public order or morality". The other ground on which restriction may be imposed in Malaysia, is:" in the interest of the security of the Federation", and in India: "in the interest of the sovereignty and integrity of India". There is another difference, and it is: whereas in India the restrictions on the exercise of the freedom to form association

must be reasonable, in Malaysia, that restriction need not be reasonable because Article 10(2) (c), Federal Constitution does not say so. It is sufficient if Parliament deems it necessary and expedient.

Both the learned Counsels, on authorities cited, do not dispute that the right to form associations means a citizen's right to form, to join, not to join or resign from an association.

It is to be noted that Article 10 of the Federal Constitution is placed under Part II, and under the title "Fundamental Liberties", and Article 19 of the Indian Constitution is placed under Part III of their Constitution under the title "Fundamental Rights".

It is necessary to examine the principles of interpretation of a written constitution. In *Minister of Home Affairs & Anor v. Fisher & Anor*, [1979] 3 AER 21, the question was whether under s. 11(5) (d) of the Constitution of Bermuda the word 'child' or 'step child' included an illegitimate child, and, if it did, then the illegitimate child was said to 'belong to Bermuda' and no restriction could be imposed on his freedom of movements or residence in Bermuda, nor could the child be expelled from Bermuda. It was urged that the principles of interpretation of an ordinary Act of Parliament should be applied. The Privy Council held that the word 'child' included an illegitimate child. Lord Wiberforce said in this Privy Council judgment:

> Here, however we are concerned with a Constitution, brought into force certainly by Act of the United Kingdom Parliament, the Bermuda Constitution Act 1967, but established by a self-contained document set out in Sch 2 to the Bermuda Constitution Order 1968. It can be seen that this instrument has certain special characteristics. It is, particularly in chapter I, drafted in a broad and ample style which lays down principles of width and generality. Chapter I is headed 'Protection of Fundamental Rights and Freedoms of the Individual'. It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the constitutions of most Carribean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms. That convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations Universal Declaration of Human Rights 1984. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. Section II of the Constitution forms part of chapter I. It is thus to 'have effect for the purpose of affording protection to the aforesaid rights and freedoms' subject only to such limitations contained in it 'being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice ... the public interest'.
>
> When therefore it becomes necessary to interpret 'the subsequent provisions of' chapter I (in this case S II) the question must inevitably be asked whether the appellant's premise, fundamental to their argument, that these provisions are to be construed in the manner and according to the rules which apply to Acts of Parliament, is sound. In their Lordship's view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the Court to accept as a starting point the presumption that 'child' means 'legitimate child' but to recognise that this presumption may be more easily displaced. The second would be more radical: it would be to treat a constitutional instrument such as this as *sui generis*, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.
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> It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution

> is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a Court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.

This principle of interpreting a written constitution was applied by the Federal Court in *Dato Menteri Othman bin Baginda v. Dato' Ombi Syed Alwi bin Syed Idrus*, [1981] 1 MLJ, 29 at 32 and by the Privy Council in *Ong Ah Chuan v. PP*, [1981] 1 MLJ, 64 at 70: that is a constitutional instrument is *sui generis* calling for principles of interpretation of its own suitable to its character, but without necessarily accepting the ordinary rules and presumption of a statutory interpretation. A Constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way.

Freedom of association has been described as "a claim of the individual to be permitted to establish relations with others of his own choosing, for the purpose of obtaining for the whole group, usually against outside individuals or groups, some special strength or advantage in the pursuit of a common end". *Fundamental Rights and the Constitution* - A case book by RKW Goonesekere, at p. 304:

> The freedom to form an association necessarily includes the negative rights of not joining an association in as much as the right to form an association, necessarily implies the freedom or volition to form or not to form, to join or not join an association - *Raja Kulkami v. State of U.P.* [1955] AIR SC 676.

It was submitted by Encik Zainur that the impugned Article XXXIA of the Kelantan State Constitution does not prevent a member of the Legislative Assembly who is a member of a political party from resigning his membership of that political party, and because of that the said Article XXXIA is not inconsistent with Article 10(1)(c) of the Federal Constitution. He further contended that the two plaintiffs were elected members and therefore their right to continue to be members of the State Legislative Assembly is not a fundamental right but a statutory right, and this statutory right can be removed by a law made by the State Legislative Assembly relating to disqualifications of membership of that legislative assembly.

Encik Zaki on the other hand submitted that the question of the right to be a member of the State Legislative Assembly is not the issue before the Court. What is in issue is whether Article XXXIA of the Kelantan State Constitution is inconsistent with Article 10 of the Federal Constitution, and if so it is invalid. What the plaintiffs are questioning is that Article XXXIA has restricted them from exercising their right of association which is a fundamental right, guaranteed by Article 10(1)(c) of the Federal Constitution.

Encik Zainur has, therefore, based his argument on the right of the Kelantan State Legislative Assembly to enact laws pertaining to disqualifications of members of the Kelantan State Legislative Assembly. He also argued, and cited authorities, that a member of a State Legislative Assembly (or Parliament) has no fundamental right but only a statutory right to his seat in Parliament or a State Legislative Assembly. I do not doubt that a member of a State Legislative Assembly may be disqualified from holding his seat by the Legislative Assembly if he infringes any law relating to disqualification. But the issue to be first decided by this Court is whether the law under which the State Legislative Assembly took action to remove the member from his seat, is itself valid.

In *Mian Bashir Ahmad & Ors. v. State of Jammu & Kashmir & Ors.*, [1982] AIR (J & K Section) 26, the High Court held that if a statute itself violates any of the fundamental rights enshrined in Part III of the Indian Constitution the statute would be invalidated irrespective of the fact whether any action has been taken under it. Consequently, it is possible to challenge the legislation as being violative of any of the fundamental rights even if no action has been taken under it.

In *Mian Bashir's* case the Acting Chief Justice and one of the Judges came to one conclusion, (which I shall refer to as the majority view)., while two other Judges came to a different conclusion (which I shall refer to as the minority view). In *Mian Bashir's* case the petitioners had challenged the validity of a new section, which was s. 24G of J & K Representation of the People Act as violating the provisions of Article 19(1) (a) and (c) of the Indian Constitution. For ease of reference I quote that s. 24G which is as follows:

> Disqualification for being a member of either House of Legislature.
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> A person shall be disqualified for being a member of the Legislative Assembly or member of the Legislative Council of the state:
>
> (a) if he, having been elected as such member of Legislative Assembly member voluntarily gives up his membership of the political party by which he was set up as a candidate in such election or of which he becomes a member after such election;
>
> (b) If he votes or abstains from voting in such House contrary to any direction or whip issued by such political party or by any person authorised by it in this behalf without obtaining prior permission of such party or person.
>
> Explanation: For the purpose of this section political party means:
>
> (a) A political party classified as a recognised political party under any law or any rule, regulation, order or notification having the force of law with respect to matters relating to, or in connection with, election to the Legislative Assembly or the Legislative Council of the State;
>
> (ii) Any other political party which is recognised by the speaker of the Legislative Assembly or, as the case may be, by the Chairman of the Legislative Council, as a political party.

The Judges in the majority view had examined the objects and reasons leading to the passing of the amendment (s. 24G). They found that the driving force behind the Act was the "widespread concern over the problems of political defections", and the baneful effect that they had on the functioning of democracy in India. They also considered the history of virulent politics of defections since 1967 which resulted in the Lok Sabha and in many of the State Legislative Assemblies unable to hold a two-thirds majority, and in most of them, no single political party was in a position to form a government. The Acting Chief Justice, Mufti Baha-Ud-Din said that it was a settled principle that in dealing with the constitutionality of a legislative enactment with reference to fundamental rights, the Court must have regard to the pith and substance and not merely to the form and appearance, and the validity of the enactment must be tested by its direct and immediate effect. He said that it was also a settled principle in India, that in order to determine the true nature and character of a legislative enactment it is permissible to take into consideration the history behind the enactment, the evils that it was intended to eradicate and the circumstances under which it was enacted. Having examined the materials before him, he was of the view that "political defections are now an order of the day in this State, and more so in other States in India, and that they generally take place not because of genuine proddings of conscience but because of personal aggrandisement and rank opportunism. They have become a pernicious form of political corruption threatening the function of Parliamentary democracy contemplated by the constitution which has necessitated the legislation. Viewed on this background, it cannot be said that the object of this s. 24G is merely to curb dissent, but the object, truly and properly understood, is to eradicate the evil of political defection in the State. In the actual operation, however, the direct and inevitable effect of the section is the legislator's liberty to vote in the legislature is impaired and, moreover, he will not be able to leave his party habitat so long as he continues to be a legislator. It is **in the light of the background** that we have to consider the validity of the impugned section. (Emphasis added).

The Acting Chief Justice further said at paras. 29 and 30 of his judgment:

> 29. That takes me to the second contention of the learned Counsel that the impugned section violates the fundamental right of the petitioner guaranteed under Article 19(1)(c) which is the right to form association or unions. His argument is that the impugned section abridges the petitioners' right to withdraw his membership of the political party to which he belongs and, so viewed, it restricts his freedom of dissociation which is an integral part of the freedom of association guaranteed under Article 19 (1)(c). To me, it appears that the argument is not well conceived. The impugned section does not prevent the petitioner from withdrawing his membership of a political party but it only lays down that he shall not continue as a legislator if he withdraws his membership of the political party to which he is attached. Thus, what the impugned section really does is that it takes away the right to continue as a member of the legislature. Viewed in this light, the impugned section cannot be invalidated. For, there is no fundamental right in any person to continue as a member of the legislature. The right to stand as a candidate for the election and the right to continue as a member after such election is a statutory right which can be validly and reasonably taken away by a statute, (*Jamuna Prasad Mukhariya v. Lachhi Ram,* AIR [1954] SC 686; *Sakhawant Ali v. State of Orissa,* AIR [1955] SC 166; and *Ebrahim Sulaiman Sait v. M.C Moohamed,* AIR [1980] SC 354 at p. 357).
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> 30. Even if it is taken that the impugned section restricts the right of the petitioner to withdraw his membership of a political party, the restriction cannot be treated as a fetter on his right of dissociation assuming that such right is an inalienable part of right of association guaranteed under Article 19(1)(c). I say so both on principle and authority. It will be noticed that the impugned section nowhere compels a person to become a member of any political party. He is entitled to join or not any political party at his choice. If he once joins it, he is also entitled to withdraw his membership at his choice and the only impediment in his way is the fact of being a member of the legislature. Until he continues to be a member of the legislature, he cannot resign the membership of his party without being prepared to forego such membership. This might create a difficulty in the matter of a person being able to resign the membership of a political party, but that does not mean that there is an absolute restriction on his right of resignation. Accordingly it cannot be said that the impugned section interferes with the right of association guaranteed to the petitioner under Article 19(1)(c).

On the other hand, Dr. Anand J in the minority view in *Mian Bashir's* case stated at paras. 54, 55, 89, 90, 94, 100 to 102 of his judgment:

> 54. The petitioners have assailed the *vires* of the aforesaid section principally on the following grounds:
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> (1) ...
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> (2) That it is also unconstitutional as it violates the petitioner's fundamental right guaranteed under Article 19(1)(c) of the Constitution of India and is not protected by Article 19(4).
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> (3) ...
>
> (4) ...
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> (5) ...
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> (6) That s. 24G is *ultra vires* and void as it destroys the basic structure of the Constitution.
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> 55. The question being legal, the facts pale into insignificance, and in any case would be relevant for deciding the references made by the speaker of the Legislative Assembly only. Suffice it to say, that the petitioners are aggrieved of the threat of disqualification on the grounds that they have voluntarily resigned the membership of the political parties on whose ticket they were elected as members after their election to the assembly and have thus incurred the disqualification imposed by the impugned legislation.

89. Article 19(1)(c) of the Constitution provides that all citizens shall have the right to form an association or union. This right has been held by the Supreme Court to include within its sweep, the right to disassociate from an association also. In *O.K. Ghosh v. E.X. Joseph*, AIR [1963] SC 812 their Lordships opined that any restriction to disassociate from an association, would make the guaranteed right under Article 19(1) 9c) of the Constitution "ineffective and even illusory". I have already opined that whatever fundamental rights are available to a citizen cannot be denied to a citizen on his election as a legislator as these rights inhere in every citizen including a legislator.

90. ... It is the reasonableness of the restriction and not the reasonableness of law or the laudability of the legislation which has to be found out. The restriction has to be reasonable from a substantive point of view.

94. ... Can this ('constitutional right' of a legislator) be taken away as a punishment or penalty for his exercising his fundamental right guaranteed under Article 19(1)(c)? In my opinion the answer must be in the negative. When the constitution guarantees to the citizen, the rights under Article 19(1)(c) those certainly cannot be taken away when the citizen is elected as a legislator. Legislators, as a class, cannot be denied the enjoyment of the guaranteed rights under Article 19(1)(c). If a citizen is to be punished for exercising his fundamental rights, then that punishment must have a constitutional sanction. No ordinary legislation can penalise any citizen for exercising his fundamental rights guaranteed under Article 19(1)(c) subject of course to the limitations contained in Article 19(4). Section 24G(a) directly and substantially impinges upon the right guaranteed under Article 19(1)(c) and makes the right "illusory" insofar as the legislators belonging to a 'recognised' political party are concerned.

100. In my opinion, therefore, it is not possible to hold that the legislators, as a class, do not have the fundamental right of association as is available to the citizens under Article 19(1)(c).

101. ... The legislation can be, of course, struck down if it directly infringes the fundamental rights of a legislator but it can also be struck down if the inevitable consequences of the legislation is to prevent the exercise of the fundamental right guaranteed under Article 19(1)(c) or to make the exercise of that right "ineffective or illusory".

102. In this connection, it is relevant to bear in mind that it is not the form but the effect of the legislation which is relevant and the Court has to consider the direct and inevitable effect of the impugned legislation on the fundamental rights. In *Smt. Maneka Gandhi v. Union of India,* AIR [1978] SC 597 (at pp. 632, 633), it was opined:

> The law on the test or yardstick to be applied for determining whether a statute infringes a particular fundamental right has undergone radical change since the days of *Gopalan's* case, AIR [1950] SC 564, the doctrine that the object and form of the State action alone determine the extent of protection that may be claimed by an individual and that the effect of the State action on the fundamental right of the individual is irrelevant as laid down in *Gopalan's* case was finally rejected. This doctrine is in substance and reality nothing else than the test of pith and substance which is applied for determining the constitutionality of legislation where there is conflict of legislative powers conferred on Federal and State Legislatures with reference to legislative lists. The test applied since *R.C. Cooper's* case was as to what is the direct and inevitable consequence or effect of the impugned State action on the fundamental right of the petitioner. It is possible that in a given case the pith and substance of the the State action may deal with a particular fundamental right but its direct and inevitable effect may be on another fundamental right and in that case, the State action would have to meet the Sate challenge of the latter fundamental right, the pith and substance doctrine looks only at the objection and object matter of the State action, but in testing the validity of the State action with reference to fundamental rights, what the Court must consider is the direct and inevitable consequence of the State action. Otherwise the protection of the fundamental right would be eroded. Their Lordships explained:

> Therefore, the word, 'direct' would go to the quality or character of the effect and not to the subject matter." and added that the criterion of "inevitable" consequence helps to quantify the extent of direction necessary to constitute infringement of a fundamental right. Now, if the effect of State action on a fundamental right is direct and inevitable, then a *fortiori* it must be presumed to have been intended ... this is the test which must be applied for the purpose of determining whether the impugned order made under it is violative of Article 19(1) (a) or (g). Thus it follows that if the inevitable consequence of the impugned legislation is to curb the fundamental rights, then it must be held to be *ultra vires* and unconstitutional. "Direct and inevitable effect" as used in the aforesaid judgment does not imply that before an action can be struck down as unconstitutional, it has to be established that it has both a direct effect as well as inevitable effect on the exercise of fundamental rights. The action would be struck down if either it directly affects the fundamental rights is such that it makes their exercise "ineffective or illusory". Since the inevitable effect of s. 24G (a) is that it makes the exercise of right of association guaranteed under Article 19(1)(c) ineffective and illusory in so far as the legislators are concerned, it must be held to be unconstitutional.
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> 103. ...
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> The impugned legislation seeks to punish a legislator either for exercising his fundamental rights under Article 19(1) (a) or under Article 19(1)(c). The disqualification prescribed by s. 24G, thus, makes a mockery of the guaranteed fundamental rights of the legislators as contained in Article 19(1) (a) and 19 (1)(c) and unreasonably restricts their exercise by the legislators. They can exercise those rights only on the pain of suffering disqualification of continuing as members of the Legislature. Thus, even if enacted under s. 69(1) (e) the impugned section is not only unconstitutional as offending the fundamental rights but also invalid and inoperative as infringing ss. 72 and 52 of the Constitution.
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> 104. In view of what has been said above, the conclusion is irresistable that c1. (a) of s. 24G is violative of Article 19(1)(c) of the Constitution and is not protected by Article 19 (4).

It will be seen that in arriving at their decision the Judges in the majority view in *Mian Bashir's* case had applied the test of "reasonableness" which was allowed by Article 19(4) of the Indian Constitution. They held that the object of the impugned s. 24G was truly and properly to eradicate the evils of political defections. They were also of the view that the impugned s. 24G did not stop a legislator joining or resigning his membership of a political party. The only impediment was that if the legislator chose to leave a political party he had to lose his seat in the legislature. They were of the opinion that the right of a legislator to sit and retain his seat in the legislature was not a fundamental right but only a statutory right. They, therefore, held that the amendment (s. 24G) was valid as it only took away the statutory right but not the fundamental right of a legislator and therefore, under the circumstances, it was a reasonable restriction imposed on a legislator under Article 19(4) of the Indian Constitution.

The minority view in *Mian Bashir's* case dealt with the subject matter from another angle. The Judges there, were of the view that Article 19(1)(c) of the Indian Constitution guaranteed a citizen the right of association and that this freedom is a fundamental right which remains throughout with the citizen even when he is elected as a member of the Legislative Assembly.

Dr. Anand, J stated that it is the reasonableness of the restriction and not the reasonableness of the law or the credibility of the laudability of the legislation which has to be found out. He was of the view that the impugned s. 24G imposed a punishment or penalty on a legislator for exercising his fundamental right guaranteed under Article 19(1)(c) of the Indian

Constitution. When the Indian Constitution guarantees to the citizen the rights under Article 19(1)(c), the rights cannot be taken away when a citizen is elected as a legislator. If a citizen is to be punished for exercising his fundamental rights, then that punishment must have a constitutional sanction.

As I have stated earlier Article 19(4) of the Indian Constitution allows reasonable restrictions to be imposed on the right of a citizen to exercise his right of association. But Article 10(2) (c) of our Federal Constitution does not specify the imposition of reasonable restrictions. It authorises Parliament to impose, by law, "such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality". Reasonableness is not material in Article 10(2) (c) of the Federal Constitution.

I have also stated earlier that Article 10(2) of the Federal Constitution authorises only Parliament and not a State Legislative Assembly to make law to impose restrictions on the fundamental rights of a citizen to form associations. The question is whether Article XXXIA of the Kelantan State Constitution imposes any restriction on a citizen's right to form association which is guaranteed by Article 10(1)(c) of the Kelantan State Constitution. It is true that Article XXXIA of the Kelantan State Constitution does not directly prohibit a member of the State Legislative Assembly from resigning from a political party, but that if he does so, he shall cease to be a member of the Assembly and his seat may be declared vacant by the Assembly.

Article XXXIA of the Kelantan State Constitution is not concerned with whether a member of the State Legislative Assembly was elected on a political party ticket to the Assembly. He may be elected as an independent candidate, then joins a political party and while still a member of the Assembly, resigns from that political party. In such a situation, he will still lose his seat in the Assembly under this Article XXXIA. The main object and purpose of Article XXXIA is to prevent a member of the assembly who is, or since the date of his election, has become a member of a political party, from leaving that political party for whatever reasons. It also has the object of ensuring that a party member should be loyal to his party and follow the directions of his party in carrying out his functions in the assembly or else the party may expel him from the party, resulting in his losing his seat in the Assembly.

It was also submitted to me by Encik Zainur that this Article XXXIA is one relating to disqualification of members of the State Legislative Assembly of Kelantan. I must point out that the law relating to disqualifications of members of a State Legislative Assembly is contained in s. 6, Part I of the Eighth Schedule of the Federal Constitution. Under Article 71(4) of the Federal Constitution the provisions in Part I of the Eighth Schedule must be incorporated in the Constitution of a State. Article 71(4) of the Federal Constitution states:

> 71.(4) If at any time the Constitution of any State does not contain the provisions set out in Part I of the Eighth Schedule, with or without the modifications allowed under Clause (5) (hereinafter referred to as "the essential provisions") or provisions substantially to the same effect, or contains provisions inconsistent with the essential provisions, Parliament may, notwithstanding anything in this Constitution, by law make provision for giving effect in that State to the essential provisions or for removing the inconsistent provisions.

It appears that the Kelantan State Legislative Assembly may enact laws relating to the disqualification of its members. But these laws, if enacted after Merdeka Day, (31 August 1957) would be valid only if they are not inconsistent with the provisions of the Federal Constitution. It is the duty of this Court to determine if Article XXXIA of the Kelantan State Constitution is valid. If it is valid it can be enforced and actions taken under it.

Is Article XXXIA of the Kelantan State Constitution wholly inconsistent with the provision of Article 10(1)(c) of the Federal Constitution? Surely if a member of a political party is expelled by his party, it cannot be said that the member is exercising or is prevented from exercising his right under Article 10(1)(c) of the Federal Constitution. But if his right to resign his membership of a political party is restricted in any way otherwise than by what is authorised by Article 10(2) (c), that restriction is unconstitutional.

Article XXXIA of the Kelantan State Constitution also specifies that if a member of the assembly "for any reasons whatsoever" ceases to be a member of a political party, he shall cease to be a member of the Assembly and his seat shall become vacant. The words "for any reasons whatsoever" is a phrase of wide import which includes resignation from membership of a political party. Does this phrase also include a situation when the political party is dissolved? But so long as this phrase is not intended to include resignation from a political party, or imposition of any restriction on the exercise of any fundamental right guaranteed by the Federal Constitution, I think it is not unconstitutional. It is of course better to have these words rephrased to avoid any ambiguity in its application.

The test to be applied in determining whether a statute infringes a particular fundamental right was settled in India in *Smt. Maneka Gandhi v. Union of India*, AIR 78 SC 597 where it was held that the correct test to be applied was as to what is the direct and inevitable consequence or effect of the impugned statute on the fundamental right of the plaintiffs, and if the effect of the statute on the fundamental right is direct or inevitable, then a *fortiori* the effect must be presumed to have been intended by the statute. Where, therefore, the statute directly affects the fundamental right, or its inevitable effect on the fundamental right ineffective or illusory, the statute must be held to be unconstitutional, and must be struck down.

Applying this test, it is crystal clear that Article XXXIA of the Kelantan State Constitution imposes a restriction on the exercise, by the plaintiffs here, of their right of association guaranteed by Article 10(1)(c) of the Federal Constitution. Although the plaintiffs may resign from a political party, they may only do so upon pain or penalty of losing their seats in the Kelantan State Legislative Assembly. In other words if they resign from their political party, they would be disqualified from continuing as a member of the State Legislative Assembly. Thus, *prima facie* it implies that a penalty is attracted for exercising their fundamental right guaranteed by Article 10(1)(c) of the Federal Constitution. Therefore, the inevitable effect or consequence of Article XXXIA of the Kelantan State Constitution on the fundamental right of association of the plaintiffs is that it makes the exercise of their right ineffective or illusory. This Article XXXIA of the Kelantan State Constitution must be held to have imposed a restriction on the exercise of the fundamental right of a member of the State Legislative Assembly, to resign the membership of a political party; and to that extent, this Article XXXIA must be held to be unconstitutional under Article 4(1) of the Federal Constitution as it infringes and is inconsistent with Article 10(1)(c) of the Federal Constitution.

Encik Zainur Zakaria drew my attention to the decision of Hashim Yeop A. Sani SCJ (as he then was), in *Abdul Karim bin Abdul Ghani v. Legislative Assembly of Sabah*, [1988] 1 CLJ (Rep) 1. That case dealt with an application for leave made under Article 4(4) of the Federal Constitution to commence proceedings for a declaration that a law is invalid on the ground that the legislature of the State of Sabah had no power to make that law. That law was an amended Article 18 of the Constitution of the State of Sabah which added a new provision, Clause 2(d), similar to the provisions contained in Article XXXIA of the Kelantan State Constitution. The learned Supreme Court Judge dismissed the application holding that the

Sabah State Legislative Assembly had power to enact the amendment. It is to be noted that in *Abdul Karim's* case the validity of the amended law was being challenged on the sole ground that the State Legislative Assembly Sabah had no power to enact the amendment to the said Article 18. I would treat the other views expressed by the learned Supreme Court Judge there as an *obiter dicta* since the points raised before me were never raised or argued before him then.

In the case before me, the plaintiffs conceded that the Kelantan State Legislative Assembly has the power to enact the law on disqualification of its members, but that the law as enacted, which is Article XXXIA of the Kelantan State Constitution is void under Article 4(1) of the Federal Constitution because it is inconsistent with the provisions of Article 10(1)(c) of the Federal Constitution.

For the reasons given, I find that only Parliament may enact law to impose any restriction on the exercise of the fundamental right of a citizen to associate which is guaranteed under Article 10(1)(c) of the Federal Constitution. Further, the restriction may be imposed as Parliament deems it necessary or only in the interest of the security of the federation or any part thereof, public order or morality. The word 'morality' has been held in *Mian Bashir's* case to mean and be restricted to 'sexual morality', and not 'political morality'.

A State Legislative Assembly has no power to enact law to impose any restriction on that right, and if it does so, that part of the law which is inconsistent with the provision of Article 10(1)(c) of the Federal Constitution is void under Article 4(1) of the Federal Constitution. The impugned Article XXXIA of the Kelantan State Constitution has the inevitable effect of restricting the exercise by the plaintiffs of their fundamental right to resign from a political party, and to that extent this Article XXXIA of the Kelantan State Constitution is unconstitutional, and is therefore void. If the impugned Article XXXIA of the Kelantan State Constitution is meant to include resignation of membership of a political party (which I think it does) then that part of the Article 10(1)(c) of the Federal Constitution, and is void under Article 4(1) of the Federal Constitution.

Encik Zaki also submitted that Article XXXIA is invalid because it was passed by the Kelantan State Legislative Assembly to have restrospective effect to 19 November 1990. It must be born in mind that in this case the Kelantan State Legislative Assembly was not exercising a delegated power to enact this law, and in view of the findings I have made, I do not think it necessary for me to deal with this submission here.

I therefore make the order declaring that Article XXXIA of part one of the Constitution of the State of Kelantan is inconsistent with Article 10(1)(c) of the Federal Constitution and is void under Article 4(1) of the Federal Constitution to the extent only that it imposes a restriction on the exercise of the fundamental right of a member of the Kelantan State Legislative Assembly to resign his membership of a political party.

Also found at [1992] 1 CLJ 463